NO. 34373-1-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

AMY JO MURPHY,

Appellant.

AMENDED BRIEF OF RESPONDENT

David B. Trefry WSBA #16050
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH A. BRUSIC
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

Statutes

Other Authorities

Rules

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant raised four assignments of error. The four allegations are as follows:

1. The evidence was insufficient to sustain a conviction for assault in the second degree as an accomplice.
2. The evidence was insufficient to sustain a conviction for attempted burglary second degree.
3. The evidence was insufficient to sustain a conviction for possession of a stolen motor vehicle.
4. This Court should exercise its discretion under RAP 15.2(f) and RAP 14.2 and decline to impose appellate costs if the state substantially prevails on appeal.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

Murphy raised four assignments, the State responds as follows:

1, 2 & 3. The State's evidence was sufficient to support the four counts that Murphy was convicted of, beyond a reasonable doubt.

4. The State, will not be requesting costs when it prevails.

II. STATEMENT OF THE CASE

This case was tried to both a jury and the court. Stahlman, Murphy's codefendant chose to waive his right to a jury trial, while Murphy chose to be tired by a jury of her peers.

On September 23, 2015 Mr. Oliver was at home sleeping. His home is located on Terrace Heights Drive in the city of Yakima RP 104,

114. Mr. Oliver' home is in a relatively remote location. CP 23

At approximately 2:00 AM Mr. Oliver had awakened and gone to the bathroom. While up he heard a vehicle pull up in an area near where he has a shop. RP 114, 190-1. Mr. Oliver observed the defendant reach for the shop door, the motion sensor light came on and at that time Mr. Oliver yelled at Stahlman to get the "F" out of here. RP 114, 192 When Stahlman was first observed the motion sensor light had not turned on yet. Mr. Oliver testified that for that light to be activated you need to be very close to the door. He testified that "[h]is hand was outreached towards the door…[h]e looked like he was going to try to get into my shop. His hand was outreached to the man door, to the handle of the man door. RP 115-16 CP 24. Stahlman's hand was reaching for the door, possibly three feet away and that the motion sensor light does not come on until approximately three feet from the door. RP 162, 164.

When Mr. Oliver yelled at Stahlman he ran away from the shop and Mr. Oliver heard a door slam and he observed a vehicle leaving his home. He identified this vehicle as a "late 90's white Ford Winstar van." RP 116-17, 223. The shop that Stahlman was trying to enter is, according to testimony, approximately 200 feet from the road. RP 223.

Mr. Oliver positively identified the defendant, Stahlman, as the person whom he observed trying to enter his shop on the day in question.

Stating that he was the man in the blue shirt with the tattoos all over his face. RP 117-8.

Mr. Oliver grabbed only his pants and some slip-on shoes, no shirt or phone, left his home with the intent to follow Stahlman with the hope of attracting the attention of another person or the police. RP 117-18. Mr. Oliver testified that there was never any intent on his part to fight with Stahlman because Oliver is a hemophiliac and with this condition it could easily kill him. RP 118, 129-30, 192-3.

Mr. Oliver testified that he was following the van carrying Stahlman when it entered a section of road on Roza Hill that is four-lane. He was able to observe the interior of the van and at first could not see the driver. In this section of the road while driving next to the van Mr. Oliver was finally able to see the driver. This section of the road was lit by street lights to the point of being "almost like day." Oliver testified that he could see her head. RP 122.

Oliver observed that Stahlman was trying to hide in the van. Mr. Oliver would occasionally see Stahlman's head pop up and Oliver was able to observe that Stahlman was yelling at the driver. RP 122-3.

He was able to pull next to the white van on its left hand, drivers side. RP 122-3. Mr. Oliver stated that he was near the van and that Stahlman "popped up" and he was able to see Stahlman. Mr. Oliver

described Stahlman as "in a frenzy...yelling and screaming at the driver.

Mr. Oliver identified the driver of the van, in the courtroom, as being Amy Jo Murphy, the defendant in this case. RP 123-4, 177-8, 197, 200, 217-8.

Mr. Oliver described Murphy as "in duress, definitely panic stricken" and that Stahlman continued to yell at her. During this portion of the chase they were driving 80 maybe 90 miles per hour. RP 124, 178-9.

Oliver testified that it was during this portion of the chase that she, Murphy, "rams her van into the side of my truck." He stated that it caused over $5,000.00 worth of damage to his truck. RP 124-5, 126. Photographs were admitted as exhibits that showed the damage to his truck and he described to the court and the jury what that damage was and how it was caused and that the photographs accurately depicted the damage. RP 124-26, 214-6. He testified that Murphy veered into his truck a couple of times. RP 125, 137-8, 178-9, 199. Dep. Hull observed damage to the left front fender, the bumper and the step bar of Mr. Oliver's truck. RP 266, 267-8.

Mr. Oliver testified that he was in fear for his life when the van rammed his truck. He determined that the best course of action was to slow down and get a license plate number. RP 125, 180-1, 217, 224.

The chase halted in an area that Oliver described as Terrace Estates. It was at an intersection where the van stopped that Mr. Oliver exited his truck to go to the van. It was after he had exited his truck to confront the van's occupants as to why they had been on his property and at that time he observed Stahlman running at him full speed with a small sledgehammer raised. Mr. Oliver described it as Stahlman "was on a mission...[h]e was running" "a dead run." RP 128, 129, 180-81, 201. Mr. Oliver fled back to his truck and Stahlman struck Oliver's truck with this hammer causing damage to one of the front fenders. Mr. Oliver had reentered his truck and "slammed it into reverse" as he was trying to get away from Stahlman's attack. Mr. Oliver stated that when Stahlman was running at him with the sledge hammer he feared for his life. RP 126-7, 129, 200-02, 224. Mr. Oliver's truck was only a few feet, perhaps five feet behind the van. RP 129.

Because of Mr. Oliver's hemophilia he testified that if he had been struck with the sledge hammer it would have caused more problems for him than for a person without his disease. RP 129-30. Mr. Oliver testified that he owned a body shop and the hammer that he observed in Stahlman's hand was a "one-handed sledgehammer...[t]his is more of a hammer that's more destructive" RP 132-3. He identified a sledgehammer that was shown for illustrative purposes as being very similar to the one wielded by

Stahlman when he attacked Mr. Oliver's truck. RP 132-3. The white van then appeared to be trying to back into Mr. Oliver's truck so he took evasive action, jumping the curb at which time he actually struck a fence in his attempt to get away. Mr. Oliver feared that Stahlman and Murphy were trying to ram the front of his truck, setting off the airbags which would disable his truck and leave him defenseless. RP 134-6

The chase continued for an extended length, eventually going onto the freeway then back off and into the city of Yakima. Soon thereafter the van struck a curb, went airborne and slowed to a stop. Stahlman ran from passenger side of the van but came back and helped Murphy out of the van and then they both fled the area. RP 140-3, 189-90, 205.

Mr. Oliver stopped and took the keys from the wrecked van then followed the two defendants for a while then stopped at an open convenience store and asked the operator to call the police. RP 145-6.

Mr. Oliver self-described his appearance at the end of the case in his testimony stating that "the attendant looked at (him) like I'm kind of a nutcase because I don't have a shirt on...just got out of bed...and my hair is going everywhere." RP 145, 179-90, 189-90, 207.

Mr. Oliver later determined that there had been a BMW M3 wheel and tire stolen from his property. He stated that they were very expensive. RP 148. He testified on cross-examination that the wheels and tires

while used were actually off of his personal vehicle. RP 164-5. He estimated that the wheel was worth approximately $700.00-800.00 and the tire on that wheel was worth an additional $300.00-350.00. RP 149-52. The final value placed on these two items was $900.00. RP 153. On cross examination the Deputy confirmed that the "running boards" on Mr. Oliver's truck were damaged. RP 294-5.

Mr. Oliver also found a wallet with Stahlman's identification on the ground near his shop, in the location previously described by Mr. Oliver. RP 153-4. This wheel was located near Mr. Oliver's shop and at the same location where Stahlman's wallet was found and was one of a set of four. RP 157, 161. Mr. Oliver testified that this one wheel found in the back of the crashed out van matched the others. RP 161.

The owner of the van driven by Murphy and Stahlman testified that on the day in question Stahlman had asked if he could borrow her vehicle. She told him no. She positively identified Stahlman in the courtroom. She testified that he had been allowed to borrow it before and there had been issues with his not returning the vehicle. The owner did not testify that Murphy had requested to drive the van or had used the van in the past. RP 248-9, 260-1

Dep. Hull testified that he interviewed Murphy. She told the deputy that Stahlman was her fiancé. RP 310. She also stated she had

borrowed the van earlier, about 11:00 AM and had left her purse in the vehicle. She stated she had no knowledge of the burglary at Mr. Oliver's home. RP 283, 314. Dep. Hull testified on redirect that Murphy had in fact told him she was driving the van but that it was at 11:00 AM, the deputy responded to the Conoco at 2:33 AM. RP 314.

When questioned about her whereabouts at the time of this crime Murphy gave Dep. Hull three different answers. Murphy initially stated that she was alone, then she stated that she had been sleeping in a park but did not know which park that was probably Kiwanis Park and finally she told the officer that she had a drug problem and couldn't remember. RP 293.

Stahlman admitted that he was a thief and that he did crimes of opportunity. RP 356-8. He admitted that he had stolen the tire and wheel and loaded them into the van. RP 402-3. He testified that Murphy knew that he was loading this stolen good in the van she was driving. RP 403-4

He further admitted that Murphy stopped the van and that he got out of the van with a concrete sledge hammer. RP 362-3. He took the hammer to "defend himself" against this person (Oliver) who seemed to have "ill intent." RP 363-4, 416-20. Stahlman claimed that he grabbed the hammer not knowing if Oliver was armed or not and was going to tell Oliver to "leave us the F alone." RP 435.

Stahlman admits swinging the hammer and hitting Oliver's truck but he swung because Oliver had aggressively gunned his truck towards Stahlman and according to Stahlman's testimony narrowly missing him. RP 364-5, 435-6. Later after Murphy crashed the van inside the city limits Stahlman testified that Oliver drove his truck on to the sidewalk coming after them. RP 368. Stahlman admitted that he did not have permission to possess the van on the night of this crime. RP 369.

Murphy testified that the owner nodded her head when Murphy asked to take the van and that a third party who was at the home at that time was the person who actually gave her permission. RP 452-3.

The owner testified that she did not give permission to the two codefendants nor did the alleged third party tell her that permission had been given to drive her van. RP 260-1 She was called by the police when the wrecked van was found and the investigation identified that it belonged to her. She testified that she went to look for her van in front of her house and was surprised that it was not there, that "It should have been there" and that she did not give anyone permission to take the van. RP 246-9. She further testified that the day before the police called her Stahlman had asked her specifically if he could use the van and she had told him no. The reason she had told him no was that in the past she had problems with Stahlman returning the van. RP 248-9,

Murphy was charged by amended information with six counts, Count 1 Attempted Second Degree Burglary, Count 2 Second Degree Theft (wheel and tire), Count 3 Second Degree Possession of Stolen Property (Tire and wheel), Count 4 Second Degree Assault (van), Count 5 Second Degree Assault (Hammer), Count 6 Possession of a Stolen Motor Vehicle (Van). (CP 10-12)

Murphy was found guilty of Count 1 Attempted Second Degree Burglary, Count 2 – lesser included Third Degree Theft, Count 3 (This count was dismissed by the court due to an instructional error), Count 5 Second Degree Assault (Hammer) and Count 6 Possession of a Stolen Vehicle. CP 97-8.

III. ARGUMENT

Murphy was convicted of four counts. In this appeal she only challenges counts 1, 5 and 6. Count 2 Third Degree Theft involving the theft of the wheel and tire from the victim Mr. Oliver has not been challenged.

A. Response Assignment of error – sufficiency of the evidence – accomplice to Second Degree Assault. The State proved beyond a reasonable doubt that Stahlman and Murphy committed second degree assault when Stahlman attacked the victim with a sledge hammer.

State v. Coleman , 155 Wn.App. 951, 231 P.3d 212 (2010) "The Washington accomplice liability statute makes someone who knowingly

aids the commission of a crime as culpable as the person who performs the criminal acts. RCW 9A.08.020."

To determine whether sufficient evidence supports a conviction, this court will view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). In claiming insufficient evidence, the defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. State v. Drum, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). This court will defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). State v. Homan, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). "Substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. Homan, 181 Wn.2d at 106.

The testimony of Mr. Oliver and the two defendants is almost diametrically opposed. As this court noted in State v. Hill, 83 Wn.2d 558, 520 P.2d 618 (1974), "[t[he Court will still accord an "appropriate and substantial effect" to state court "resolutions of conflicts in evidence as to the occurrence or nonoccurrence of factual events and happenings." The

reason given for this is the "trial judge and jury are closest to the trial scene and thus afforded the best opportunity to evaluate contradictory testimony." (Citations omitted)

Substantial evidence supports each and every count that the State filed against Murphy. This case was split into a trial by jury and by the court. Even the court, sitting as a trier of fact, found the co-defendant, Stahlman guilty.

The State's theory was that these two defendants were acting in concert committed these crimes, as was addressed in, State v. McChristian, 158 Wn.App. 392, 400-01, 241 P.3d 468 (2010) "A person is an accomplice under the statute if, with knowledge that it will promote or facilitate the commission of the crime, he aids another person in committing it. RCW 9A.08.020... Our Supreme Court has made clear, however, that an accomplice need not have knowledge of each element of the principal's crime to be convicted under RCW 9A.08.020; general knowledge of " the crime" is sufficient. " [A]n accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality." (Citations omitted.)

State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). "Intent to attempt a crime may be inferred from all the facts and circumstances."

It is extremely important to look to the totality of the facts, not just this one isolated gesture. These are a pair of people who went to a location which is off the beaten path. They then parked their stolen van on private property, parking so that when they fled the victim's property they were able to drive straight out. RP 116-17, 223 Mr. Oliver testified that he heard a door slam on the fleeing car, he does not state that he heard the engine start which clearly means the vehicle, driven by Murphy was left running clearly to facilitate flight if their theft was detected. Stahlman testified that he told Murphy to turn the van around, clearly this was not a crime of opportunity as Stahlman claims. RP 356.

Murphy and Stahlman state that they had no idea who was chasing them, but they clearly fled the victim's property in the middle of nowhere after being told to get the F... off of the property and soon thereafter a truck begins to follow them. RP 114, 116-17, 192, 223. There is no doubt that the jury was able to understand that this following vehicle was the victim, Mr. Oliver.

Murphy was acquitted of the assault charge arising from the use of the van to ram the victims truck. However, Murphy's intentional act of steering the van into Oliver's truck was to create fear in Oliver and these actions were still before the jury for use in the totality of their discussion and ultimately the verdicts rendered.

Mr. Oliver testified about what he observed occurring in the van as he pulled alongside. He observed that Stahlman was very agitated and yelling at Murphy, who was driving the van, after which the van swerved into Oliver's truck causing damage. RP 122-3, 124-5, 178-9. The fact that there was damage to the vehicle was also set forth in the testimony of Dep. Hull who observed the damage to the victim's truck. The testimony of Mr. Oliver was that at the time the two vehicles hit they were both traveling down the road, at around two o'clock in the morning at speeds up to 90 miles per hour. Mr. Oliver testified under oath that the actions of the defendant's made him fear for his life. He stated that the van hit him a couple times. RP 122-3, 123-5, 177-8, 178-9, 197, 200, 214-16,217-8, 266, 267-8.

The trial court, in Stahlman's trial, determined, sitting as the trier of fact, that Stahlman's assault charge, which arose from his use of a sledge hammer, occurred when Stahlman took the sledge hammer, raised that hammer over his head, thereby creating fear, it constituted a threat to and was likely to cause the death of Mr. Oliver.

As the trial court determined so clearly, the jury found that Mr. Oliver, the victim, testified truthfully and that Stahlman's testimony was not credible.

The testimony which the jury heard was that the chase briefly halted at an intersection and Mr. Oliver exited his truck to go to the van. When he exited his truck to confront the van's occupants he observed Stahlman running at him full speed with a small sledgehammer raised. Mr. Oliver stated that Stahlman "was on a mission…[h]e was running" "a dead run." RP 128, 129, 180-81, 201. When Oliver fled back to his truck Stahlman hit the truck with the sledge hammer damaging the front fender. Mr. Oliver reentered his truck "slammed it into reverse" trying to get away from Stahlman's attack, fearing the threatening actions of Stahlman. Oliver testified he feared for his life because of what Stahlman did with that sledge hammer. RP 126-7, 129, 200-02, 224.

Mr. Oliver's testified that his hemophilia made him far more vulnerable, stating if he had been struck with the sledge hammer it would have caused more problems for him than for a person without his disease. RP 129-30. Oliver testified the hammer in Stahlman's hand was a "one-handed sledgehammer…[t]his is more of a hammer that's more destructive" RP 132-3. He identified a sledgehammer as being very similar to the on wielded by Stahlman. RP 132-3,134-6.

The testimony of Mr. Oliver in contrast with the story told by Murphy and Stahlman were presented to a jury. That jury found Ms. Murphy guilty of one count of assault and acquitted her on the other.

Clearly this jury was listening and made a well-reasoned decision based on the totality of the evidence presented.

Murphy raises the issue of self-defense.

Self-Defense is set out in RCW 9A.16.020 which provides, in relevant part, that:

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
> . . .
> (3) Whenever **used by a party about to be injured**, or by another lawfully aiding him or her, **in preventing or attempting to prevent an offense against his or her person**, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary . . .
> (Emphasis added)

The language of the Washington Pattern Instruction 17.02 states;

> The use of or attempt to use force upon or toward the person of another is lawful when used or attempted by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

"To prove self-defense, there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of death or

great bodily harm; (2) this belief was objectively reasonable; [and] (3) the defendant exercised no greater force than was reasonably necessary." State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997) *cited by* Werner, 170 Wn.2d at 337-38.

The right self-defense is historically recognized, "the right of the defendant" to act in defense of himself when he has a good faith belief that he is in apparent danger. State v. Carter, 15 Wash. 121, 123, 45 P. 745 (1896). The right to act in self-defense is viewed from the perspective of the defendant, as the situation appeared to him. Id. The right of self-defense is grounded upon two elements: (1) That the party attacked may use sufficient force to offset the actual danger; [and] (2) that he may use sufficient force to offset the apparent danger. State v. Churchill, 52 Wash. 210, 214, 100 P. 309 (1909).

This Division ruled in State v. Miller, 89 Wn. App. 364, 367-8, 949 P.2d 821 (Div. 3 1997) as follows "Evidence of self-defense is evaluated "from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." This standard incorporates both objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine

what a reasonably prudent person similarly situated would have done. (Citations omitted, emphasis mine.)"

See also State v. Graves, 97 Wn. App. 55, 61-62, 982 P.2d 627 (1999):

> To raise the claim of self-defense, the defendant must first offer credible evidence tending to prove self-defense. The burden then shifts to the State to prove the absence of self-defense beyond a reasonable doubt.
>
> "To establish self-defense, a defendant must produce evidence showing that he or she had a good faith belief in the necessity of force and that that belief was objectively reasonable." Evidence of self-defense is viewed "from the standpoint of a reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." This approach incorporates both subjective and objective characteristics. (Citations omitted, emphasis mine.)

The testimony of Murphy and Stahlman does not rise to the level of "some" "credible" evidence that either Murphy or Stahlman acting as an accomplice or as the principle with the sledgehammer in his hand were defending themselves.

The evidence presented by the State was that Stahlman and Murphy testified that they feared Mr. Oliver and yet they never pulled over and just stopped, they never attempted to call the police, they too raced past the one open store that Mr. Oliver slowed at in an attempt to alert another drive. They simply raced through town in an attempt to flee

from the crimes they had committed and their actions were that of a primary aggressor not of a person or persons who were trying to defend themselves.

Mr. Oliver testified that he did nothing that was aggressive, he drove next to the fleeing car, he backed away from the van when it attempted to back into him and swerved into a fence to avoid the van, he ran back to and re-entered his truck when Stahlman ran at him with the sledge hammer, he did not try to run over or assault Stahlman when Stahlman was out of the van and Mr. Oliver most definitely did not drive down the sidewalk once the van had crashed out.

There was nothing in the testimony of the State's witnesses or through the testimony of Stahlman or Murphy which would rise to the level of these two defendants needing to defend themselves.

For a defendant to be entitled to a fact-finder's consideration of his or her self-defense claim, the defendant "must produce some evidence demonstrating self-defense." State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

It is true that this level of proof "is low, it is not nonexistent, " and the defendant must produce some evidence showing that he or she has met the statutory requirements for claiming self-defense. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). If the defendant produces some

evidence demonstrating the exercise of self-defense, "the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt." Walden, 131 Wn.2d at 473.

"One cannot deny striking someone and then claim to have struck that person in self-defense." State v. Barragan, 102 Wn.App. 754, 762, 9 P.3d 942 (2000).

Stahlman claimed that he had to try and attack a truck that was following him after he committed the crimes he had committed was because he years ago testified in another trial is at best ludicrous, especially in light of his own testimony that he never called the police. Murphy, as the accomplice to this count of assault is painted with the same brush. The jury simply did not believe either Murphy or Stahlman. And they did believe Mr. Oliver when he testified that with his medical condition he was truly in fear of his life when he veered his truck off the road and into a fence trying not to run over Stahlman, but to get away from the attack with the sledgehammer.

The lawful use of force statute in nonhomicide prosecutions, RCW 9A.16.020, provides in relevant part:

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
> (3) Whenever used by a party about to be injured, ... in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious

> interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

See also State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009) (stating RCW 9A.16.020 applies in nondeadly force self-defense claims). This claim of self-defense is valid only if there was some evidence at trial that he and therefore Murphy had struck Mr. Oliver's truck because they reasonably feared that he was about to be injured by Oliver. Kyllo, 166 Wn.2d at 863.

State v. Homan, 181 Wash.2d 102, 105-06, 330 P.3d 182 (2014) set forth the following, "'Substantial evidence' is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." id. at 106, 330 P.3d 182. We defer to the trial court, as finder of fact, for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence.

One of the crucial statements from the testimony regarding the level of fear or belief that there was a need for retaliatory acts of self-defense came from Stahlman. Near the end of his time on the stand when asked by the State if he had called the police, an all-encompassing question regarding the event, he stated "no." RP 448. This is clear evidence that neither Murphy or Stahlman were in such fear for his life

that he needed to contact the police to "save him" from Mr. Oliver nor was there a need for self-defense.

Who logically would literally, if the defendant's stories are to be believed, take a sledgehammer to a "car fight." The jury in Murphy's case was there listening to all the testimony from the victim and the defendants. Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Because this is a challenge of the sufficiency of the evidence Murphy necessarily admits the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One is no less valuable than the other. There is sufficient evidence to support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt.

This challenge to the sufficiency must necessarily take into account the testimony of not just the victims of these crimes but also the unbelievable story told by the two codefendants.

Shawn Stahlman intimated that because he had been attacked before and had testified in a homicide trial that this person chasing them could have had any intent. RP 359-60. This was his thought when he left the safety of a van and attacked Mr. Oliver's truck with the sledge hammer. The jurors when they are charged by the court to follow the law are not also told to forget their common experience and common sense. The jury trial process relies on those very traits.

Murphy claims that she did not know when she stopped at the stop sign that Stahlman was going to grab the sledge hammer that was obviously in the van and go attack the victim. And yet she argues that if such an attack took place it was done for self-defense purposes. The State continues to be amazed the defendant claims completely opposing theories to defend their actions. Here Murphy says that she did not know that an assault was going to occur or for that matter occurred and yet she is claiming that there was an assault by Stahlman but it was in self-defense.

The jury heard the proffered story that during this 13-mile chase that so terrified Murphy, that caused her to be "terrified and hysterical" while being chased by a huge truck she had no knowledge of what

Stahlman was doing when he jumped from the van she was driving with a sledgehammer in his hand. And that this action was, under her theory of self-defense, a legal and rational act to stop this aggressor, this nut case driving a Huge truck in a crazy manner in the middle of the night.

Neither Murphy or Stahlman called the police or stopped and asked for help.

Here once again it is clear from the facts presented to the court that the State proved each and every element of assault.

B. Response Assignment of error – sufficiency of the evidence – Attempted Burglary. The State proved beyond a reasonable doubt that Stahlman and Murphy committed Attempted Burglary in the second degree.

The testimony was that the victim observed Mr. Stahlman, a person, approaching the door to his shop. Oliver saw Stahlman reach his hand towards the door all the while on a piece of property, in the middle of the night while Murphy sat in a running van waiting to whisk Stahlman away with the stolen good.

Stahlman admitted, under oath, that he had committed a theft while at the property, a theft that was committed prior to his attempt to burglarize the shop. He stated "So I'm a thief. I steal stuff. It's pretty much opportunity crimes." RP 355. His testimony regarding why he would not commit and did not commit a burglary, just a theft, was that, "I'm not

going to go where I'm risking six to eight years doing a burglary or 18 months which is – I rationalize it to myself, which is retarded. I shouldn't be doing that. I just -- this wasn't worth to me. The risk wasn't worth the reward." RP 355. He admitted that they went down a dirt road then he had Murphy turn the van around as he walked further to the location of the items he had seen and was going to steal. RP 356. This testimony and that of Mr. Oliver where Oliver says that Stahlman was reaching for the door, clearly without a BMW wheel and tire in hand, indicate that this was not Stahlman's first act, the act of reaching for the door was at least the second part of this criminal act. Stahlman says that he ran when Oliver yelled. RP 357.

Because this is a sufficiency challenge Murphy is bound by the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One is no less valuable than the other. There is sufficient evidence to support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt.

The jury could and did find the State had proven this crime beyond a reasonable doubt based on the admitted criminal act of theft by Stahlman, combined with the remote location, no reason given by either defendant as to why Stahlman would have needed to be on the porch area of the shop, reaching for the door, from mere feet away, at 2:00 AM and the fact that he fled when confronted. Fled to the waiting, running, get-away vehicle operated by his cohort, Murphy.

Washington's attempt statute also requires intent to commit the crime plus a substantial step toward its commission. The criminal attempt statute, RCW 9A.28.020(1), states: A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

Jury instruction 11 stated "A substantial step is conduct which strongly indicates a criminal purpose and that is more than mere preparation." CP 46 WPIC 100.05.

In order to constitute a "substantial step," the conduct must strongly corroborate the actor's criminal purpose. State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002); State v. Aumick, 126 Wn.2d 422, 894 P.2d 1325 (1995). In the general context of attempt cases, a substantial step requires more than mere preparation, State v. Townsend, 147 Wn.2d at 679, and more than a mere request for another to commit a crime, State

v. Billups, 62 Wn.App. 122, 813 P.2d 149 (1991).

The fact that the primary perpetrator, Stahlman, reached for the door is a fact substantially supported by the record. This is a substantial step towards the commission of the crime of attempted burglary. **This was not charge as the completed crime it was charged as an attempt.**

The fact that this is a substantial step was not found in a vacuum. It was made in conjunction with the testimony regarding the location of the home, the time of day – 2 AM, the theft of the tire and wheel. The fact that Stahlman was reaching for the door in conjunction with the other facts allowed the jury to conclude, as did the court in Stahlman's trial, that this reach was a substantial step towards the completion of the crime of attempted second degree burglary. RP 115-16, 162, 164.

The direct and circumstantial evidence regarding the defendant being on the property in the first place, the theft of the wheel and tire, Stahlman's prior criminal history and his unreliable/untrustworthy testimony should be and were taken in totality and that is undoubtedly what the jury did.

State v. McDaniel, 155 Wn.App. 829, 230 P.3d 245 (2010) "Analytically, flight is an admission by conduct. Evidence of flight is admissible if it creates 'a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive

reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.' (Citations omitted.)

Not to be repetitive but, the theory throughout this trial was that Stahlman and Murphy acted as a team when they committed these crimes, once again State v. McChristian, 158 Wn.App. 392, 400-01, 241 P.3d 468 (2010) "A person is an accomplice under the statute if, with knowledge that it will promote or facilitate the commission of the crime, he aids another person in committing it. RCW 9A.08.020... Our Supreme Court has made clear, however, that an accomplice need not have knowledge of each element of the principal's crime to be convicted under RCW 9A.08.020; general knowledge of " the crime" is sufficient. " [A]n accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality." (Citations omitted.)

State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). "Intent to attempt a crime may be inferred from all the facts and circumstances."

Once again, if this court or the jury were to look merely at the fact that Stahlman reached for the door handle in absence of the other facts, it might appear that his actions were not a substantial step towards the commission of the Attempted Second Degree Burglary charged and for

which Murphy was charged as an accomplice. But when the totality of the facts, out in the middle of the night, on private property that is out in the country, concurrent theft of the wheel and tire, planning the getaway and actually positioning the van so that that getaway could be accomplished in a very short time span, then this reach does constitute the lynch pin in this attempted criminal act

C. Response to Sufficiency of the evidence Count 6 possession of stolen motor vehicle.

"A person is guilty of possession of a stolen motor vehicle if he or she possess[es] a stolen motor vehicle." RCW 9A.56.068(1). Possession of stolen property is defined, in part, as "knowingly to receive, retain, possess, conceal, or dispose of stolen property." RCW 9A.56.140(1). Once again Murphy challenges the sufficiency of the evidence "[t]he test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192,201, 829 P.2d 1068 (1992).

There is no dispute that Murphy was in possession of the van. The question she raises is was it stolen. Ms. Ann Wells the owner testimony was that she had not given any person permission to take her van. Murphy's claim is a third party, described as a long-term companion of

Wells gave her permission after Wells nodded her head yes when Murphy had asked to use the van. This is refuted by the testimony of Ms. Wells who had to go look out her front window to see if her van was there and the testimony that it should have been there. RP Wells specifically stated that Stahlman had asked to use the van and Wells had told him no because of problems in the past with Stahlman returning the van.

The issue is whether sufficient evidence supports Ms. Murphy's possession of a stolen motor vehicle conviction. She contends the State failed to prove she had knowledge the vehicle was stolen.

In determining the sufficiency of the evidence, our standard of review is "whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192,201,829 P.2d 1068 (1992). Circumstantial evidence is considered to be as reliable as direct evidence. State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). RCW 9A.56.068 provides: "(1) A person is guilty of possession of a stolen vehicle if he or she possess[es] a stolen motor vehicle." To prove that a defendant "possessed" stolen property, the State must prove that the

defendant possessed property with knowledge that it was stolen. RCW 9A.56.140; State v. Plank, 46 Wn. App. 728, 731, 731 P.2d 1170 (1987). Mere possession of recently stolen property is insufficient to establish that the possessor knew the property was stolen. State v. Couet, 71 Wn.2d 773,775,430 P.2d 974 (1967). But possession of recently stolen property, coupled with any other circumstantial evidence tending to show guilt sufficiently proves knowledge. Couet, 71 Wn.2d at 775-76. The fact finder may reasonably infer knowledge if "a reasonable person would have knowledge under similar circumstances." State v. Womble, 93 Wn. App. 599, 604, 969 P.2d 1097 (1999).

Murphy was in possession of the stolen vehicle. Ms. Wells testified that she had not given permission for the van to be taken and had to go look when contacted by the police to determine if it was there and testified when she found it was gone that it should have been there.

Clearly this evidence along with Murphy's abandonment of and flight from the van when she wrecked it and changing story regarding her actual possession of the van was sufficient for the jury to find her guilty beyond a reasonable doubt.

Viewing this evidence in a light most favorable to the State and being aware that circumstantial evidence is considered as reliable as direct evidence, a reasonable person could infer the vehicle was stolen based on

Murphy's inconsistent statements, the timeline of events, and Ms. Wells' testimony denying permission for anyone to drive the vehicle.

This was sufficient to prove Murphy had knowledge the vehicle in her possession was stolen, making that evidence sufficient to support Murphy's conviction for possessing a stolen motor vehicle.

Response to Assignment of Error D – Appellate costs.

The now often cited State v. Sinclair, 192 Wn.App. 380, 385-86, 388-90, 367 P.3d 612 (quoting RAP 14.2), review denied 185 Wn.2d 1034 (2016) allows for the awarding of costs to the primary prevailing party on appeal. "The commissioner or clerk "will' award costs to the State if the State is the substantially prevailing party on review, 'unless the appellate court directs otherwise in its decision terminating review. "'... When a party raises the issue in its brief, we will exercise our discretion to decide if costs are appropriate.... We base our decision on factors the parties set forth in their briefs rather than remanding to the trial court."

The State, by and through the Yakima County Prosecutors Office continues to assert the right to request these costs. However, in the interests of justice and judicial economy the State shall not be requesting appellate costs in this case when it prevails.

IV. CONCLUSION

For the reasons set forth above this court should deny this appeal.

Respectfully submitted this 15th day of June 2017,

By: s/ David B. Trefry
DAVID B. TREFRY WSBA# 16050
Senior Deputy Prosecuting Attorney
P.O. Box 4846 Spokane, WA 99220
Telephone: 1-509-534-3505
E-mail: David.Trefry@co.yakima.wa.us

DECLARATION OF SERVICE

I, David B. Trefry state that on June 15, 2017 emailed a copy, by agreement of the parties, of the Respondent's Brief, to: Marie Trombley at marietrombley@comcast.net

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 15th day of June, 2017 at Spokane, Washington.

By: s/David B. Trefry

DAVID B. TREFRY WSBA# 16050
Senior Deputy Prosecuting Attorney
Yakima County
P.O. Box 4846 Spokane, WA 99220
Telephone: 1-509-534-3505
E-mail: David.Trefry@co.yakima.wa.us

YAKIMA COUNTY PROSECUTORS OFFICE

June 15, 2017 - 1:14 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	34373-1
Appellate Court Case Title:	State of Washington v Amy Jo Dana Murphy
Superior Court Case Number:	15-1-01504-0

The following documents have been uploaded:

- 343731_Briefs_20170615130931D3368672_1720.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was Murphy 343731 Brief Amended.pdf

A copy of the uploaded files will be sent to:

- joseph.brusic@co.yakima.wa.us
- marietrombley@comcast.net
- valerie.marietrombley@gmail.com

Comments:

This is an amended brief. There was an error on page 30 of the original brief, which was pointed out by counsel for Ms. Murphy, This amended Brief corrects that error.

Sender Name: David Trefry - Email: David.Trefry@co.yakima.wa.us
Address:
PO BOX 4846
SPOKANE, WA, 99220-0846
Phone: 509-534-3505

Note: The Filing Id is 20170615130931D3368672